PUBLIC LAW Journal

Vol. 23, No. 3
Summer 2000

An Official Publication of the State Bar of California Public Law Section

MCLE SELF-STUDY: *The Brave New World of Adult Entertainment Regulation*

*By Jeffrey Goldfarb, Esq.**

SCENARIO: You've just finished drafting the conflict of interest letter requested by the Mayor, you have revised the contract with the city's trash hauler, drafted the letter to the guy who refuses to remove from his front lawn the inoperable '73 Ford pick-up which is currently sitting on cinderblocks, and completed the various other tasks that were due by noon. You finally have time to catch up on that big stack of Daily Journals sitting in the corner of your office. You read with interest the Supreme Court's recent decision in *City of Erie v. Pap's A.M. TDBA "Kandyland"*[1] where the Court upheld Erie's enforcement of its general ban on total nudity against an adult oriented business that provided live nude entertainment. After reading the case you start to wonder whether your city's adult oriented business ordinance is up to date. You pull the good book (the city code) off your shelf and find that the adult ordinance, which was last updated at the beginning of Mr. Reagan's second term, only allows adult oriented businesses with the approval of a conditional use permit. This causes you to wonder, "is this a 'state of the art ordinance'?" Well, given the changes that have resulted from the numerous decisions on cities' efforts to regulate adult oriented businesses, your city's ordinance is as much a "state of the art" ordinance as that '73 Ford pick-up truck resting on cinderblocks in the guy's front yard is a "state of the art" SUV. Time to consider amendments.

The purpose of this article is to discuss some regulatory trouble-spots that may exist in your local ordinance and to discuss some of the recent case law that has clarified (or, in some cases muddied the waters) the permissible boundaries associated with the regulation of adult oriented businesses. In true Letterman fashion,[2] what follows is the "top 10 list" of things to consider when reviewing your adult oriented business ordinance.

10. Though The "Message" May Be Unclear, The Court Considers Adult Oriented Businesses To Be Protected By The First Amendment.

Although probably not necessary, it is sometimes worth reminding people that adult entertainment, i.e., sexually oriented films, books, and live performances, including nude dancing, involves speech, and as such, is protected by the First Amendment. The most recent recitation of this perhaps counter-intuitive conclusion is contained in the Supreme Court's plurality opinion in *City of Erie v. Pap's*: "As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think it falls only within the outer ambit of the First Amendment's protection."[3] Imbued with this constitutional protection, regulations on adult entertainment are not analyzed under the "rational basis test" associated with most governmental regulation, but under the heightened scrutiny afforded by the intermediate level "time, place, and manner test" (also called the "O'Brien Test"[4]) if the regulation is content neutral, and the strict scrutiny test if the regulation is content based.[5]

Continued on page 3

Inside this Issue

PUBLIC LAW JOURNAL
www.calbar.org/publiclaw

EDITOR
Heather A. Mahood
hemahoo@ci.long-beach.ca.us

DESIGN & PRODUCTION
David Price
dave@digitalsoup-design.com

SUBMISSIONS

We solicit original manuscripts, which should be limited to 1,250 to 2,500 words (and, preferably, saved on 3.5" Macintosh or IBM diskettes in Microsoft Word or WordPerfect with a typed double-spaced printout on 8 1/2" x 11- paper). Authors should provide sufficient information to permit adequate identification in the publication. The editorial staff reserves the right to edit submitted manuscripts as necessary. Edited manuscripts will be sent to authors for approval only where extensive revision might affect an article's substance. Strict publication deadlines do not allow time to send proof to authors. Manuscripts should be sent to Heather Mahood • City Attorney's Office • 333 W. Ocean Blvd., 11flr, Long Beach, CA 90802 • (562) 570-2210 • Fax (562) 436-1579. In most cases, we can grant reprint permission to recognized professional organizations. Inquiries regarding subscriptions, etc., should be addressed to: Tricia Horan, State Bar of California, 180 Howard Street, San Francisco, CA 94105. PH (415) 538-2223

DISCLAIMER

The statements and opinions here are those of editors and contributors and not necessarily those of the State Bar of California, the Public Law Section, or any government body.

Public Law Section Roster

— Executive Committee Roster —

Paul Kramer
Sacramento
Chair

Henry D. Nanjo
Sacramento
Vice-Chair

Mark Steven Cornelius
Pleasant Hill
Treasurer

Ricarda L. Bennett
Thousand Oaks
Immediate Past Chair

Judith A. Trice
Richmond
Immediate Past Chair

Manuela Albuquerque
Berkeley

Lawrence J. Duran
Sacramento

Debra Ann Greenfield
San Diego

Joyce Marlene Hicks
Oakland

Jeffrey Kightlinger
Los Angeles

Stephen L. Millich
Simi Valley

Susan G. Levenberg
San Jose

Heather A. Mahood
Long Beach

Jeremy G. March
Encino

Jonathan B. Stone
San Diego

Michael R. Woods
Sonoma

— Advisors —

John K. Chapin
Berkeley
C.E.B. Liaison

Larry Doyle
Sacramento
Legislative Representative

Delaina Finch
Oxnard
CA Alliance of Paralegal Assn.

Tricia A. Horan
San Francisco
Section Coordinator

Julie Martinez
San Francisco
Staff Assistant

Clara L. Slifkin
Los Angeles
Board Liaison

Patrick R. Dixon
Los Angeles

James R. Greiner
Sacramento

Joe R. Hicks
Los Angeles

9. Regulations Of Adult Oriented Businesses Are Typically Upheld Only When Those Regulations Are Designed To Reduce The Secondary Effects Adult Oriented Businesses Have Been Demonstrated To Create.

In *City of Renton v. Playtime Theaters, Inc.*,[6] the Supreme Court reaffirmed its prior plurality opinion in *Young v. American Mini Theaters*[7] which found that adult oriented business regulations which are designed to reduce the secondary effects that such businesses have on their surrounding neighborhood are "content neutral" because they are enacted to reduce the businesses' secondary effects rather than suppress whatever message is being conveyed by the entertainers or material.[8] These secondary effects include, but are not limited to increased blight, increased criminal activity, particularly sexual related crime, depressed property values, and increased vacancy rates for properties in the vicinity of adult oriented businesses. As a content neutral regulation, it will withstand constitutional scrutiny so long as the regulation is within the power of the government to adopt (which it almost always is), is "narrowly tailored" to serve a substantial governmental interest [9], and leaves open alternative avenues of communication.[10] Courts have repeatedly held municipalities have a substantial governmental interest in preventing or reducing these secondary effects. As a result, any regulation on adult oriented businesses must be narrowly tailored to reduce the "secondary effects" that the government has a substantial interest in preventing.

8. As Applied To Adult Oriented Businesses, The Term "CUP" Means "Constitutionally Un-Permitted."

Although not a particularly recent development, case law prohibits cities from requiring the "standard" conditional use permit as a pre-condition to operating a sexually oriented business. Courts have considered such a requirement to be an unconstitutional prior restraint because "the ability to make decisions based on ambiguous criteria such as the 'general welfare' of the community effectively gives the commission the power to make decisions on any basis at all, including an impermissible basis, such as content based regulation of speech." *Smith v. County of Los Angeles*,[11] citing *Dease v. City of Anaheim*.[12]

7. A Municipality Can Require Adult Oriented Business Operators Obtain A License Prior To Establishing Such A Business Providing The Permit Standards Are Objective.

While the city cannot base its permitting decisions on vague and ambiguous standards, it can require a permit as a precondition to operating an adult oriented business **IF** the permitting standards are purely objective.[13] Courts will typically uphold a permitting or licensing system based on "quantifiable standards which the agency charged with deciding individual cases is expected to apply."[14] Such permitting systems do not function as a prior restraint because they prohibit the decision-maker from silencing objectionable speech based on criteria unrelated to the secondary effects the adult oriented businesses tend to create. As an example, a permit system that requires the city to find that the proposed use will not be contrary to the welfare of the community allows the decision maker sufficient discretion to deny the permit based upon a belief that strip clubs are not in the best interests of the community. Such a regulatory system would surely fail as an unconstitutional prior restraint. Alternatively, a finding prohibiting the establishment of a strip club within 500 feet of a children's school is sufficiently objective such that denial cannot be subterfuge, based upon the licensor's objections to the message being conveyed at the strip club. Accordingly, such a licensing system based upon such objective criteria is likely to be upheld.

6. Timeliness Is Next To Godliness.

The obligation to obtain a permit prior to establishing a sex oriented business could also be considered an unconstitutional prior restraint if the ordinance does not provide the proper "procedural safeguards." If a permit is required prior to engaging in expressive activity, the ordinance must mandate: 1) that the decision to issue or deny the permit is made within a brief, specified, and reasonably prompt period of time; and 2) that judicial review of the decision can occur within a short period of time ("prompt judicial review"). In *FW/PBS, Inc. v. City of Dallas*,[15] the Supreme Court invalidated Dallas' licensing system because the ordinance did not guarantee that the city's decision on the permit would be made within a short period of time. Cases have typically held that a city's determination on an ordinance is sufficiently prompt if it is made between 30 and 60 days of the date the application is submitted. (See, e.g., *TK Video, Inc. v. Denton County*[16,17].)

In *Baby Tam & Co., Inc. v. City of Las Vegas*,[18] the Ninth Circuit invalidated Las Vegas' adult oriented business permitting system even though Las Vegas' ordinance specifically stated that an applicant can seek judicial review of a decision denying its permit by availing him or herself of Nevada's administrative mandamus process. The court concluded that such a process did not provide prompt judicial review because state law failed to impose upon the court the obligation to actually decide the case within a specified period of time. The court therefore invalidated the ordinance even though it

MCLE CREDIT

Earn one hour of MCLE credit by reading this article and answering the questions that follow, choosing the one best answer to each question. Mail your answers and a $20 processing fee (no fee for Public Law Section members) to:

Public Law Section
State Bar of California
180 Howard Street
San Francisco, CA 94105

Make checks payable to The State Bar of California. You will receive the correct answers with explanations and an MCLE certificate within six weeks.

CERTIFICATION

The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing education. This activity has been approved for minimum education credit in the amount of 1 hour.

realized that only the state, and not the city, could fix a problem. In response to the *Baby Tam* case, the California Legislature quickly adopted Code of Civil Procedure section 1094.8 which provides that a challenge to a denial or revocation of a permit to engage in expressive activity can be filed within 20 days of the city's decision, and that the court must decide the case within 50 days of the filing of the petition.[19]

5. Look, But Don't Touch.

In *Tily B., Inc. v. City of Newport Beach*,[20] the court found that California cities can prohibit physical contact between patrons and entertainers at sex oriented businesses. The court determined the requirement that "the ordinance further a substantial governmental interest is met because the city enacted these restrictions to combat prostitution, sexually transmitted diseases, criminal activity and the secondary effects of adult entertainment establishments." [21] The court found this goal was satisfied because "the city could reasonably conclude that separating entertainers from customers reduces the opportunity for prostitution and drug dealing. The restriction is no more than necessary, for the message of the erotic dances not lessened by allowing customers to look but not touch, and the provision is constitutional."[22] The court similarly upheld a prohibition against patrons handing tips directly to entertainers. "The no-direct tipping rule . . . is likewise constitutional." "Preventing the exchange of money between dancers and patrons reduces the likelihood of illicit transactions," and, "while the tipping prohibition may deny a patron one means of expressing pleasure with the dancers' performance, sufficient alterative methods of communication exist for the patron to convey the same message."[23] Finally, the court upheld the requirement that entertainment can only be provided on a stage which is raised 18 inches off the floor and is only occupied by an entertainer when patrons are at least 6 feet from the stage (the "six foot buffer rule"). "The stage height and distance requirements . . . furthers the city's interest in crime and disease prevention, they are narrowly tailored to meet the goal, and they are constitutional. 'It is reasonable to conclude that the 6 foot [stage distance] rule would further the state's interests in the prevention of crime and disease.'"[24]

4. It Ought To Be A Crime.

In fact, now it is. There is a long line of authority establishing that the Legislature has preempted cities from adopting criminal prohibitions against sexual activity by occupying the field of criminal sexual relations.[25] Many of the operating regulations contained within an adult oriented business ordinance (i.e., the prohibition against physical contact) could be considered regulations of sexual activity. As a result, some courts have concluded that cities are preempted from criminally prosecuting certain violations of their sex oriented business ordinances. Long ago, however, the Legislature carved out a narrow exception to this general preemption rule when it adopted Penal Code sections 318.5 and 318.6. Those provisions allow the criminal enforcement of regulations applicable to live entertainment at restaurants and bars, but exempted from the exception theatres, concert halls and similar establishments. As adult oriented business owners are able to get "expert" testimony that virtually every live entertainment adult oriented business is considered a "theater, concert hall or similar establishment,"[26] this exception prevented the criminal prosecution of various operational requirements at most adult oriented businesses which provide live entertainment. However, in 1998 the Legislature adopted Assembly Bill 726, which amended Penal Code sections 318.5 and 318.6 by prospectively eliminating the "theater concert hall and similar establishment" requirement. As a result, an ordinance can now provide a misdemeanor punishment for a violation of a sex oriented business ordinance in all establishments licensed as theaters, concert halls and similar establishments that began operation after July 9, 1998.

3. The Civil Alternative.

So what do you do about live entertainment establishments which operated as "theatres, concert halls and similar establishments" before July 9, 1998? While you cannot criminally prosecute violations of the ordinance, you can structure your ordinance so that violations of the operational requirements result in a civil revocation of an operator's permit. In *Tily B., Inc. v. City of Newport Beach*, the plaintiff violated numerous provisions of the city's adult oriented business ordinance including the prohibition against direct tipping, raised stage and 6-foot buffer rule, and the prohibition against physical contact between patrons and entertainers. After numerous notices, the city revoked the business' permit and the business sued claiming, in part, that the city was preempted from taking such an action. In rejecting this claim, the court specifically noted "while the state has preempted the criminal aspects of sexual activity,[27] localities remain free to regulate and license such conduct through non-criminal provisions. [28] State law thus does not preempt the Newport Beach ordinance. The city's ordinance is regulatory, not criminal, since permit revocation is the only sanction. . . . A non-criminal licensing statute aimed at activities expressly left open to local regulation does not conflict with the general law and is valid.[29]"

2. The Naked Truth Is That You Cannot Be Naked.

In a series of three separate decisions,[30] courts have provided California cities substantial guidance on whether and to what extent cities can apply a prohibition against nudity to adult oriented businesses. In each of these cases, the court found such regulations to be constitutionally permissible because the regulations were content neutral and satisfied the intermediate level of scrutiny test. Specifically, the court found the prohibition on nudity furthered the city's substantial governmental interest in reducing the pernicious secondary effects adult oriented businesses create. "Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L.Ed.2d 24, 106 S.Ct. 925 (1986), *Young v. American Mini Theaters, Inc.* 427 U.S. at 51-52, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), and *California v. LaRue*, 409 U.S. 109, 34 L.Ed.2d 342, 93 S.Ct. 390 (1972), it was reasonable for *Erie* to conclude that such dancing was likely to produce the same secondary effects."[31]

1. And You Thought Recitals Only Served To Bore You With Bad Piano and Ballet.

And the number one thing to think about in drafting or amending an adult oriented business ordinance is: . . . Include a monumental amount of recitals demonstrating how the specific regulations contained within your ordinance are designed to reduce the secondary effects studies have demonstrated adult oriented businesses create. Although the law is influx with regard to how much

evidence the city council must have before it for the court to conclude the regulations are designed to serve a substantial governmental interest, caution dictates that including within your ordinance sufficient recitals to explain why the regulations reduce the blight and crime associated with adult oriented businesses will greatly increase the chance that your ordinance will survive judicial scrutiny.

ENDNOTES

* *Jeffrey A. Goldfarb is a partner at the law firm of Rutan & Tucker LLP in Costa Mesa, California. He serves as the Assistant City Attorney for the cities of Irine and San Clemente and represents various cities on the regulation of adult oriented businesses.*

1. *City of Erie v. Pap's A.M. TDBA "Kandyland"*, ___ U.S. ___, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000)
2. Alright, I admit it, this would be a whole lot funnier if Letterman's writers actually wrote it. The Journal gave them first crack at the article, but they charge.
3. Id. at 120 S.Ct. 1382.
4. The so called "O'Brien Test" was developed by the Supreme court in *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672. The test finds a content neutral regulation on expressive conduct (like burning your draft card or, presumably, stripping naked in front of paying strangers) to be constitutional if: 1) the regulation is within the power of the government to enact; 2) it furthers an important or substantial governmental interest; 3) it is unrelated to the suppression of free expression (i.e., it is content neutral); and 4) the incidental restrictions on First Amendment freedoms is not greater than essential to the furtherance of that interest. As the court noted in *Ward v. Rock Against Racism* (1989) 491 U.S. __, 109 S.Ct. 2746, 105 L.Ed.2d 661, the O'Brien Test and the 3-part "content neutral time, place and manner test" "are, in reality the same test. "We have held that the O'Brien Test in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions." (Id., 491 U.S. at 798, 109 S. Ct. at 2757, 105 L.Ed.2d at__.)
5. If your regulation of adult oriented businesses is content based you might want to save the city coffers the cost of litigation and simply amend your ordinance. Content based regulations almost always lose.
6. *City of Renton v. Playtime Theaters, Inc.* (1986) 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925
7. *Young v. American Mini Theaters* (1976) 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440
8. It is for this reason that it is very important to include in your ordinance appropriate recitals demonstrating that the purpose of the regulations is to combat the increased crime, blight and vacancy rates found to be caused by the establishment of adult oriented businesses.
9. As noted above, one iteration of intermediate scrutiny test applicable to content neutral regulations stated that the regulation be "no greater than essential" to serve the substantial governmental interest of reducing the aforementioned secondary effects. This unfortunate use of words have led adult oriented business owners to argue that the regulation must satisfy the "least restrictive means" analysis typically associated with "content based" regulations. Not so. In *Ward v. Rock Against Racism* (1989) 491 U.S. __, 109 S.Ct. 2746, 105 L.Ed.2d 661, the court concluded that a regulation is sufficiently "narrowly tailored" "so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." (491 U.S. at 798, 109 S.Ct. 2757, 105 L.Ed.2d 661 at 680.)
10. See note 2.
11. *Smith v. County of Los Angeles* (1994) 24 Cal.App.4th 990
12. *Dease v. City of Anaheim* (C.D. Cal. 1993) 826 F.Supp. 336
13. *In Smith v. County of Los Angeles* (1994) 24 Cal.App.4th 990, the court did note that discretion is not prohibited, it merely must be constrained to operate within a narrow set of parameters. As a result, the *Smith* court appeared to suggest that the legislative body can delegate discretion to the permit authority providing that "In delegating such authority, the local legislative body must provide criteria which are sufficiently precise to meet the constitutional requirement that they be 'narrow, objective and definite.'" (Id., at 1004.)
14. *Smith, supra*, 24 Cal.App.4th at 103.
15. *FW/PBS, Inc. v. City of Dallas* (1990) 493 U.S. 224, 107 L.Ed.2d 603, 110 S.Ct. 596
16. *TK Video, Inc. v. Denton County* (5th Cir. 1994) 24 F.3d 705
17. However, it should be noted that courts evaluate the specified approval period based on the complexity of the approval process. Therefore, ordinances requiring a public hearing can justify a slightly longer period of time than ordinances which establish a ministerial approval process.
18. *Baby Tam & Co., Inc. v. City of Las Vegas* (9th Cir. 1998) 154 F.3d 1097
19. The U.S. Supreme Court upheld a similar time period as adequate "prompt judicial review." (See, *U.S. v. Thirty-Seven Photographs* (1971) 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1416.)
20. *Tily B., Inc. v. City of Newport Beach* (1998) 69 Cal.App.4th 1
21. Id. at 21.
22. Id. at 22.
23. Id. at 23.
24. Id.
25. See, e.g., In *re Lane* (1962) 52 Cal.2d 99, where the court held that "the Penal Code sections covering the criminal aspects of sexual activity are so extensive in their scope that they clearly show an intention by the Legislature to adopt a general scheme for the regulation of the subject."
26. It has been common for adult oriented business owners to enlist the assistance of a theater arts professors to testify, as experts, that the business is actually "theater."
27. *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805 at 808
28. *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 227 at 296; *EWAP v. City of Los Angeles* (1979) 97 Cal. 3d 179 at 191 (licensing of peep shows); *Eckel v. Davis* (1975) 51 Cal. App.3d at 843 (nudity prohibited in public parks and beaches).
29. *Brix v. City of San Rafael* (1979) 92 Cal.App.3d 47 at 53
30. See, *Barnes v. Glen Theater, Inc.* (1991) 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504, *City of Erie v. Pap's* A.M. *TDBA "Kandyland"* (2000) ___ U.S. ___, 120 S.Ct. 1382, 146 L.Ed.2d 265, and *Tily B., Inc. v. City of Newport Beach* (1998) 69 Cal.App.4th 1.
31. A word of caution: With the exception of *Tily B.*, each case was decided on a plurality decision.

MCLE SELF-ASSESSMENT TEST

1. Erotic entertainment is not protected by the First Amendment.

   ❑ True ❑ False

2. Regulations on erotic entertainment are judicially evaluated under either the O'Brien test if the regulation is content neutral or the strict scrutiny test if the regulation is content based.

   ❑ True ❑ False

3. It is permissible to prohibit adult oriented businesses in your town because, as everyone knows, they are just icky.

   ❑ True ❑ False

4. An adult oriented business licensing ordinance that prohibits the establishment or commencement of the business until such time as the license is issued is not unconstitutional if the ordinance authorizes the city to "as long as reasonably necessary" evaluate the application.

   ❑ True ❑ False

5. The Legislature has attempted to address the requirement of "prompt judicial review" through the adoption of Code of Civil Procedure Section 1094.8.

   ❑ True ❑ False

6. It is not unconstitutional to require a standard conditional use permit for an adult oriented permit.

   ❑ True ❑ False

7. The legislative body may never delegate discretion for permit authority for an adult oriented permit.

   ❑ True ❑ False

8. Recitals are a crucial part of any adult oriented business ordinance because it is one of the best ways to demonstrate to the court that the regulations adopted in the ordinance were adopted to address the pernicious secondary effects adult oriented businesses have been demonstrated to create.

   ❑ True ❑ False

9. The U.S. Supreme Court has upheld the application of prohibitions against public nudity to adult oriented businesses.

   ❑ True ❑ False

10. Courts have upheld adult oriented businesses' ordinances that provide a city 30 days from application submission to make a decision on whether it will grant or deny the permit.

    ❑ True ❑ False

11. A California court has upheld the application of prohibitions against public nudity to adult oriented businesses.

    ❑ True ❑ False

12. Courts will evaluate an approval period for adult oriented permits based upon the complexity of the approval process.

    ❑ True ❑ False

13. Courts have always held that cities have the ability to criminally prosecute all violations of their adult oriented business ordinances.

    ❑ True ❑ False

14. A city can prohibit the hand-to-hand transfer of tips between customers and patrons.

    ❑ True ❑ False

15. Because sexual contact between a patron and an entertainer is such an integral part of the performance, it cannot be prohibited in adult oriented businesses.

    ❑ True ❑ False

16. A city can criminally prosecute violation of its adult oriented business ordinance, even if the regulations affect sexual activity, so long as the business was not deemed to be a theater, concert hall, or similar establishment before July 9, 1998.

    ❑ True ❑ False

17. Revocation of an adult oriented business's license is an acceptable way to respond to the business's repeated violations of the city's adult oriented business ordinance.

    ❑ True ❑ False

18. It is an unconstitutional restraint on First Amendment freedoms to require entertainment at an adult oriented business to be conducted on a raised stage which is separated from patrons by a 6 foot buffer.

    ❑ True ❑ False

19. The four part "O'Brien test" is substantively different than the three part "content neutral time, place, and manner test."

    ❑ True ❑ False

20. Courts will evaluate an approval period for adult oriented permits based upon the complexity of the approval process.

    ❑ True ❑ False

Confiscation Of Weapons By Law Enforcement Agencies

By: Kate Hart, Esq.*

I. INTRODUCTION

This article is intended to address the procedures which are applicable to the confiscation and disposition by law enforcement agencies of firearms or other deadly weapons which a mentally unstable person is likely to use against himself, herself or another in a harmful manner. Specifically, this article outlines the weapons confiscation procedures provided in Welfare and Institutions Code Section 8102 and Penal Code Section 12028.5, and analyzes alternative methods of disposal or the return of confiscated weapons through consent to dispose forms and settlement agreements.

II. WEAPONS CONFISCATION PROCEDURES PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 8102

The key focus in this article is weapon confiscations which occur after an individual has been detained pursuant to Welfare and Institutions Code Section 5150. Section 5150 authorizes a peace officer, or other county-designated officer, to detain a person for a 72-hour mental examination who, upon probable cause, appears to be a danger to himself, herself, or others due to a mental disorder.

Section 8102(a) of the California Welfare and Institutions Code provides that:

> "Whenever a person, who has been detained or apprehended for examination of his or her mental condition [5150] or who is a person described in Section 8100 or 8103, is found to own, have in his or her possession or under his or her control, any firearm whatsoever, or any other deadly weapon, the firearm or other deadly weapon shall be confiscated by any law enforcement agency or peace officer, who shall retain custody of the firearm or other deadly weapon."

Subsections (b) through (g) of Section 8102 outline the procedures for the confiscation of weapons in possession of those who pose a danger to themselves or others. However, before reviewing the various subsections of section 8102, it is important to understand the legislative history of the statute.

A. Legislative History

Section 8102 was amended in response to *Bryte v. City of La Mesa*,[1] which was decided on January 27, 1989. Pursuant to Section 8102, as amended, an agency or city must petition a superior court to retain possession of any weapons and ammunition and to allow their forfeiture.

In *Bryte*, the sole issue before the court was the constitutionality of Section 8102. Plaintiff Bryte was an outpatient at a hospital and living temporarily in a nearby motel. At a point and time not indicated in the court's opinion, police were dispatched to Bryte's motel room where they discovered her in possession of a knife, a handgun, four rifles, and a shotgun. The police detained Bryte for examination of her mental condition and confiscated her weapons in accordance with Section 8102. Subsequently, the hospital to which Bryte was taken determined that she was not a danger to herself or others and released her. Thereafter, Bryte informally requested the return of her weapons from the requisite police department; however, the police department would not release the weapons. At this time, Section 8102 did not provide for notice and a post-seizure hearing. After various attempts to obtain her weapons, Bryte brought suit in superior court seeking the return of her weapons, as well as a determination of the unconstitutionality of Section 8102. The superior court ordered the return of Bryte's weapons, but found that the statute was constitutional.

Upon review of the case, the court of appeal analyzed the confiscated weapons as "property" and "accordingly, that the due process clauses of the federal and state constitutions apply to their seizure."[2] The court noted that case law requires that a statute authorizing peremptory seizure of property contain within the statute itself a provision for administrative review, and that Section 8102 had no such provision. As a result, the court of appeal found Section 8102 to be unconstitutional on its face, but that incorporating a provision for administrative review would deem the statute constitutional again.

Today, Section 8102 is in essentially the exact same state as it was when it was amended in 1989 with the exception that the time frames in which the law enforcement agency has to file a petition have been extended from 15 days to 30 days after the release of a person, and the respondent has 30 days instead of only 15 days to request a hearing before a superior court judge.

B. Interrelation with Section 8103(f)

Section 8103(f) provides in pertinent part as follows:

> "No person who has been taken into custody as provided in Section 5150 because that person is a danger to himself, herself, or to others, . . . shall own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase any firearm for a period of five years after the person is released from the facility. A person described in the preceding sentence, however, may own, possess, control, receive, or purchase, or attempt to own, possess, control, receive or purchase, any firearm, if the superior court has, pursuant to paragraph (4), upon petition of the person, found, by a preponderance of the evidence, that the person is likely to use firearms in a safe and lawful manner."

This subsection was added to Section 8103 during the 1990 legislative session. The import of this section is evidenced when filing

a petition under Section 8102. The filing law enforcement agency should indicate whether the respondent was released after an evaluation by hospital personnel, or whether it is unaware of any such release in the petition. By doing this, the law enforcement agency directs the court to the applicable statute under which to make its determination of whether to return a weapon. For instance, if a respondent was released after an evaluation by hospital personnel (i.e., respondent was not admitted to the health care facility), Section 8103 would not apply and the court would need to make a determination under Section 8102 as to whether the return of the confiscated weapon would be likely to result in endangering the respondent or others. In contrast, if the respondent was admitted to a health care facility, under Section 8103(f)(1), the court may not return the weapon unless and until the respondent petitions the court and obtains an order pursuant to Section 8103(f)(4).

C. Filing a Petition Under Section 8102

Section 8102(b) requires that once a weapon has been confiscated from a person who has been detained, the police officer must notify the person of the procedure for the return of any weapon which has been confiscated. Subsection (b) also indicates what notice must be given to the detained person. Specifically, notice of a weapon confiscation must be given to the professional person in charge of the detaining facility upon the person's release or served upon the person at the time of his or her release. This notice should indicate the procedure by which the person may request the return of his or her confiscated weapon.

Subsection (c) of Section 8102 gives the law enforcement agency 30 days from the date the person is released to file a petition in the superior court for a hearing to determine whether the return of a weapon "would be likely to result in endangering the person or others." Notice of the petition must be sent concurrently with the petition. Of course, upon a showing of good cause, the court may allow the agency to file a late petition.

While subsection (b) requires health facility personnel to notify the confiscating law enforcement agency upon the detained person's release, the reality is that the health facility personnel often fail to notify law enforcement agencies. As a result, it is imperative that at least one member of the law enforcement agency be designated to track the releases of detained individuals. Many police agencies assign this duty to a member of the investigations department.

D. Respondent Must Request a Hearing or an Order for Default Will Be Entered

The detainee (or respondent) must request a hearing from the requisite superior court within thirty (30) of the date of the notice. It is the law enforcement agency's duty, pursuant to Section 8102(d), to inform the person or respondent of his or her right to request a hearing. Such information should be included in the notice of petition which should be served upon the detainee at his or her last known address provided to the law enforcement agency at the time of the incident in question concurrently with the petition for disposition of weapons. The notice must also indicate that the detainee's failure to request a hearing on the petition will result in a default order forfeiting the confiscated firearm or deadly weapon.

Under Section 8102(e), if the person responds and requests a hearing, the court clerk shall set a hearing no later than 30 days from the receipt of the request. The court clerk is then required to notify the person and the district attorney of the date, time, and place of the hearing. Notably, Section 8102(e) does not specify how the person is to request a hearing and does not require the court clerk to notify the filing enforcement agency if such a hearing is in fact requested. Often, a respondent will call the local enforcement agency or the city attorney's office and ask how he or she is to request a hearing. The notice of petition that is provided to the person should include the phone number and address of the court clerk of the county in which the petition is filed. Some counties have forms by which a respondent is to request a hearing. Other counties allow respondents to orally request a hearing.

If the respondent does not request a hearing within thirty days of the notice, the law enforcement agency may file a petition for order of default.[3] When a respondent fails to request a hearing, the attorney should send an original order of default (plus a copy) along with a copy of the notice of petition and petition, and a cover letter to the court clerk requesting that the judge execute the orders due to respondent's failure to request a hearing, and asking that the court clerk file stamp the order and return it to the attorney's office for the attorney's files in the self-addressed envelope provided.

Sometimes a respondent will request a hearing after the 30-day period has expired, claiming he or she miscounted the days for filing. In that instance, the statutory time period for requesting the hearing can be waived by the agency (as the judge probably would have granted the person the hearing in any case for good cause). By doing this, the agency appears empathetic, as well as reasonable. For the most part the order of default should be sent out on the 31st day. That way, if a respondent requests a hearing 10 to 15 days after the statutory period has expired, it is too late because the order has most likely already been entered.

E. The Hearing on the Petition

Petitions for disposition of weapons are usually treated as "complex civil litigation" cases. Depending on the county in which the petition is filed, there may be one judge who handles all of the complex civil litigation cases. If this is the case, it is advisable that the attorney determine how the judge prefers to adjudicate such petitions. For instance, under Bryte, it appears that the evidentiary hearing on a petition for disposition of weapons should be informal and not subject to standard rules of evidence (i.e., hearsay is allowed). Nevertheless, this is not always the case. Judges presiding over a petition for a disposition would have discretion to hear the evidence otherwise and apply the formal rules of evidence. Accordingly, attorneys should be prepared to come into contact with a judge who insists that the hearing be in accordance with the formal rules of evidence. In other words, while an agency attorney may file a petition which contains hearsay evidence, be certain that there are hearsay exceptions which apply to allow the judge to consider the otherwise inadmissible statements.

To simplify the administrative hearing, it is easiest to attach a declaration of the reporting officer, as well as any other responding officer who had contact with the respondent. Copies of the police report, along with any supplements, should be attached to the declarations. In some instances, the attorney may be able to rest the agency's case on the declarations alone. In others, the respondent may want to testify as to issues not covered in an officer's declaration, in which case the attorney should call the officer as a witness to refute any untrue testimony offered by a respondent. In spousal abuse cases, the attorney may wish to subpoena the victim to testify. Finally, the attorney will want to

review a respondent's psychiatric records if he or she was admitted to a health care facility. Since psychiatric records are confidential, the agency attorney will need to prepare an ex parte petition to obtain an order to review the records.

F. When Returning A Confiscated Weapon Is Required

There are two instances in which confiscated weapons should be returned to a person: the first is when the court orders the return after an evidentiary hearing; and the second, is when the local enforcement agency does not file a petition to dispose of the confiscated weapon(s) within 30 days of the person's release, and the court has not granted an extension of time to do so.

1. Court Order

A court will issue an order to return a confiscated weapon or firearm to its owner only after an evidentiary hearing has been held, and based on the evidence presented, it finds that the return of the weapon or deadly firearm would not be likely to result in endangering the respondent or others.

2. The Enforcement Agency Does Not File A Petition

If the law enforcement agency which confiscated a weapon or deadly firearm pursuant to Section 8102 does not file a petition for disposition for the weapon or firearm within 30 days of the release date of the person, the agency must return the confiscated weapon or firearm to its owner.[4] Of course, the agency need not return the weapon if it may lawfully destroy the weapon pursuant to another lawful statute, policy or procedure.

III. WEAPONS CONFISCATION PROCEDURES PURSUANT TO PENAL CODE SECTION 12028.5

Penal Code Section 12028.5 addresses the procedures for taking temporary, or in some cases permanent, custody of firearms involved in a domestic violence dispute. Subsection (b) requires a peace officer (as defined in Sections 830, *et seq.*) who is present at the scene of a domestic violence incident involving a threat to human life or a physical assault to take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual search. Immediately after confiscating the weapon, the peace officer must issue a receipt of such confiscation to the owner or person in possession of the weapon indicating where the weapon may be recovered and the date after which the owner or possessor can recover the weapon.

Firearms confiscated under PC Section 12028.5 must be held not less than 48 hours. In addition, a confiscated firearm may not be held longer than 72 hours unless the firearm is being retained as evidence related to pending criminal charges, or it was illegally possessed.

The key provision under PC Section 12028.5 for law enforcement agencies looking to permanently confiscate weapons used in domestic violence disputes is subsection (f). That section provides as follows:

"In those cases where a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 10 days of the seizure, initiate a petition in superior court to determine if the firearm or other deadly weapons should be returned."

While law enforcement agencies rarely file 12028.5 petitions for disposal of weapons (due mainly to a victim's unwillingness to testify), it is important that the agency have the opportunity to file the petition. In order to at least have the opportunity to file the petition, the person from whom the weapon was confiscated needs to be served with a receipt of confiscation of firearms, as described above. Requirements for filing a notice of petition and petition are located in subsections (g) through (i), and are substantially similar to the filing requirements contained in Section 8102.

IV. ALTERNATIVE DISPOSAL OR RETURN OF CONFISCATED WEAPONS

Sometimes the incident report prepared by a law enforcement agency does not have sufficient evidence to warrant the filing of a petition either under Section 8102 or 12028.5. Instead of immediately returning a confiscated weapon or firearm due to inability to file a petition to dispose of the weapon/firearm, an agency may attempt to dispose of them in an alternative manner - either with consent of the owner of the weapon, or in accordance with a settlement agreement between the owner of the firearm, a third party designee, and the law enforcement agency.

A. Consent to Disposal/Destruction of the Weapon by Owner

Often owners and victims alike request (or don't object) to the destruction of the confiscated weapon or firearm at the time of the incident in question. Such requests are frequently included in the law enforcement agency's report on the incident. In such instances, it may be more efficient to obtain the consent to dispose or destroy of the confiscated weapon from the owner of the weapon, in lieu of filing a petition for disposition.

Either oral or written consent will suffice to allow an agency to proceed with destruction of the weapon; however, written consent is more satisfactory. If oral consent is given, and written consent refused or unobtainable, the reporting officer should prepare a supplement to his or her original report of the incident and indicate the date and time at which he or she obtained consent to destroy the weapon, that he or she spoke with the owner and can verify it was the owner, and the gist of the conversation in which the owner granted consent to disposal of his or her confiscated firearm.

B. Return of the Confiscated Weapon to a Third Party Designee

Another alternative to filing a petition for disposition is to return the confiscated weapon to a third party designee such as a relative of the owner pursuant to a settlement agreement. Settlement agreements are appropriate in at least two circumstances. The first is when an owner of the confiscated firearm (or his or her attorney) contacts the law enforcement agency's office (or attorney's office) and requests that a petition not be filed, but that an agreement for return of the confiscated weapon be arranged.[5] The second instance in which a settlement agreement may be an option is when the law enforcement agency does not believe it has sufficient evidence to prevail in a hearing for the disposition of the weapon, but the agency believes it may have liability for returning the weapon to the owner.

After the agency and its counsel have determined that a settlement agreement is appropriate, the agreement must be drafted. Generally, the settlement agreement should include a recital of facts pertaining to the confiscation of the weapon, as well as a release provision and other general contract provisions. The agreement should also

contain a prohibition against the owner obtaining possession, control or both of the confiscated weapon within five years of the date of his or her release, or if the weapon was confiscated pursuant to Section 12028.5, the date of the confiscation of the weapon. Once the agreement is drafted, it must be executed by all of the parties and the confiscated weapon must be delivered to or picked up by the third party designee.

ENDNOTES

1. *Bryte v. City of La Mesa* (1989) 207 CA 3d 687, 255 CR 64.
2. Id. at 689, 255 CR at 65.
3. Wel. & Inst. Code Section 8102(f).
4. Wel. & Inst. Code Section 8102(g).
5. This is true especially in cases where there is a collection of weapons which have been confiscated.

* *Kate Hart is an attorney with the law firm of Woods & Daube in Sonoma, California.*

You Are Invited to the Public Law Section's Reception for the 2000 Public Lawyer of the Year

On Saturday, September 16, during the State Bar Annual Meeting in San Diego, the Public Law Section will be honoring Prudence Kay Poppink, Hearing Officer and Counsel for the Fair Employment and Housing Commission, as this year's Public Lawyer of the Year. She has devoted 25 years of her legal career to the enforcement of civil rights under the Fair Employment and Housing Act, is an expert on family care leave, disability and sexual harassment, and has worked tirelessly with the Legislature to expand civil rights protection for all Californians.

Now Open!

MEMBERS ONLY WEB PAGE ACCESS

By the time you receive this issue, we expect that the Public Law Section's web page will have its members only page up and running. We'll be moving some of our content to that page, including:

- Updated reports of the Public Law Section's Legislative Subcommittee on pending state legislation.
- Public Law Internet Links.
- Notes of developments of interest to section members.

To access these pages, point your browser to www.calbar.org/publiclaw and click on the link to the Members Area. When you are asked for your password, use your State Bar number as both your user ID and your password.

We recommend that you immediately change your password; to do so follow the link on the Members Area page. If you have any difficulty, send a message to publiclaw@hotmail.com. Send your ideas for additional members only features to the same address.

Takings Law: When Does A Regulation Leave An Owner With No Economically Viable Use?

*By Harriet Steiner, Jan Patrick Sherry and Eric Robinson**

I. INTRODUCTION.

The citizens of Mudville have just voted to incorporate. Mudville will have to make land-use decisions affecting landowners throughout the new city. Invariably, these land-use decisions may aggravate some landowners, who may claim that the new land-use designations and zoning are so restrictive as to amount to an unconstitutional taking of their property without just compensation.

Unfortunately for the new Mudville City Council members, takings law is not clear. A land-use regulation effects a taking if either: (1) the regulation does not substantially advance legitimate state interests; or (2) it denies an owner economically viable use of his land.[1] The rhetorical simplicity of this test is deceiving.

First, despite the appearance that the two prongs are independent, most takings cases require courts to balance one prong against the other. The two-part takings test represents two alternative extremes, either of which constitutes a taking. Most cases fall between these two extremes and require a balancing test by the Court.

Second, "the precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court."[2] This article focuses on the second half of the analysis, identifying and explaining a series of factors that courts employ in deciding whether a regulation's economic impact supports the finding that an unconstitutional taking has occurred.

A property owner may challenge land-use regulations in two ways. The regulation can be challenged because on its face it eliminates all economically viable uses of the property ("facial challenge"). Alternatively, the regulation can be challenged as it is applied to a particular piece of land ("as-applied challenge"). While the language of the two-part takings test is the same in either case, a court's analysis of economically viable use in a facial challenge generally is much simpler than in the more fact-intensive "as-applied" challenges.

II. IN A FACIAL CHALLENGE, IF THE REGULATION ALLOWS ANY USE, THERE IS NO TAKING.

One of the first orders of business of the new Mudville City Council is likely to be enactment of land-use regulations, including a general plan and zoning ordinance. In analyzing facial challenges to planning and zoning regulations, courts look to whether mere enactment of a regulation allows the property owner to use his or her land or requires that it be left economically idle. Courts do not engage in extensive analysis of whether or not the permitted uses actually offer profitable opportunities. If the land-use regulation in question allows some use of the land, then the government has not deprived the owner of the economically viable use of his or her land, regardless of whether the permitted land use will be immediately or actually profitable. If, on the other hand, the regulation requires the owner to leave the land economically idle, the courts have found that a facial taking has occurred.

In analyzing regulatory takings, courts find that a facial taking occurs when the landowner must leave its land completely idle.[3] In *Lucas*, the Supreme Court declared that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[4] The Court further noted that this deprivation of economic use typically occurs when the government "requir[es] land to be left substantially in its natural state."[5] The *Lucas* Court held the South Carolina regulations that barred the building of any occupable dwelling on plaintiff's land without exception constituted a taking of that property for which just compensation was due.

"Generally, the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property."[6] "The [property owner] bears the ultimate burden of proof in showing that the restriction, on its face denies beneficial uses."[7] In *Christensen v. Yolo County*,[8] the court held that the existence of permitted land uses including agricultural, agricultural buildings, garages, parking areas, stables, roadside stands, day nurseries and daycare centers precluded the regulation from being considered a taking on its face.[9] Similarly, in *Lake Nacimiento*, the court found that the existence of the right to construct single family residences and to engage in agricultural uses barred a facial challenge to the statute.[10]

Finally, in *Agins v. City of Tiburon*, the Court affirmed a demurrer that had been sustained against a facial takings challenge to municipal land-use regulations that were alleged to "forever prevent" the residential development of the most expensive undeveloped suburban property in California.[11] The regulations, on their face, allowed the development of only one to five residences on the plaintiffs' five-acre tract,[12] which had "magnificent views of San Francisco Bay."[13] Although there could be no question that the challenged regulations substantially impaired the value of the property, the Court found no facial taking, because the challenged regulations allowed a use of the property.

Thus, if Mudville can demonstrate that their regulations allow property owners some use of their property, those regulations will survive a facial takings challenge.

III. AS-APPLIED CHALLENGES REQUIRE A BALANCING TEST.

After the Mudville City Council adopts a general plan and zoning ordinance, the City will administer its land-use program by reviewing and acting upon applications for development permits and other approvals. This is where the issue of as-applied takings comes into play. There are few easy rules for determining whether the granting, conditioning or denial of development approvals will cause a taking.

There are two *per se* taking rules, however. First, a land-use decision that causes a permanent physical invasion of the subject property, no matter how minute, constitutes a taking for which just compensation must be paid.[14] Second, where it is without a doubt that a regulation "denies all economically beneficial or productive use of land," there has been a taking.[15] In all other cases, courts balance three factors in determining whether the regulation constitutes a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[16] In determining whether a regulation denies the property owner economically viable use of his land, only the first two of the *Penn Central* factors come into play. The third focuses solely on the nature and quality of the challenged government action and, thus, does not directly affect economic viability.[17]

A. DIMINUTION IN VALUE DOES NOT RISE TO THE LEVEL OF DENIAL OF ALL ECONOMICALLY VIABLE USE OF LAND.

If the regulation avoids the pit falls of the two *per se* takings rules, the Mudville City Council will be able to defeat challenges based solely on claims of diminution of value. As long as "value" remains in the property, no "as-applied" taking has occurred.

Mere diminution in value of real property, standing alone, cannot establish a taking.[18] In *William C. Haas, & Co. v. City and County of San Francisco*,[19] the San Francisco Planning Commission adopted a 40-foot height limitation, promulgated density controls, and rezoned the owner's property from R-5 to R-3. These legislative acts made the property owner's proposal for development impermissible and reduced the value of the property from $2,000,000 to approximately $100,000.[20] In deciding whether all economically viable use of the property had been lost, the court focused on the remaining available uses, not on whether the property could be developed as originally planned. The court found that Haas retained economically viable use of its land because "[t]he regulations do not prevent Haas from developing the property, even though the planned development cannot be undertaken." That the land retained more than $100,000 in value was sufficient to overcome the claim that all economically viable use had been lost. In *MacLeod v. Santa Clara County*, the County Planning Commission denied a landowner's timber harvesting use permit.[21] Although the owner had been unable to turn a profit using his land as a cattle ranch, the court focused on the fact that the restrictions placed on plaintiff's property did not deprive him of all use of his land. The court emphasized that "MacLeod was free to continue to raise cattle or to lease out the property for grazing lands, and retained the right to continue to hold the property as an investment."[22] The court characterized the landowner's argument that he had been deprived of the most profitable short term use of the property as "simply another way of claiming that he has suffered a diminution in the value of his property . . . . The Supreme Court has repeatedly held that mere diminution in value, standing alone, cannot establish a taking."[23] The MacLeod Court found that the owner retained economically viable use, reasoning that he could still use his land, even though the available uses may not be profitable.[24] It held that timber harvesting may have been the most immediately profitable use of land, but declared that it was "unwilling to equate immediate overall profitability with the requirement of 'economic viability.' To do so would be a major departure from the prior jurisprudence in this area."[25]

The corollary to the preceding rule is that the denial of the highest and best use for a property does not constitute a taking[26] "Even where there is a very substantial diminution in value of land, there is no taking."[27]. In *Long Beach Equities*, Long Beach Equities ("LBE") purchased the property with the intent of building 1,100 residences on the property. After LBE purchased the property, the County down-zoned the 250-acre parcel to allow one residence per 160 acres. The court concluded that: "Even if it were true that LBE's profit may be severely reduced, it would fail to meet the test that there be no viable economic use of the property."[28] "The restrictions in the Growth Management Ordinance and the open space zoning designation do not rule out development upon annexation."[29] "Although County has down zoned most of the subject property to OS-160 (open space designation permitting one residential structure per 160 acres of land), LBE may apply for a zoning change for permissible 10-acre parcels." LBE failed to demonstrate that there was no economically viable use for its property.

B. THE THREE PENN CENTRAL FACTORS

Beyond the preceding rule and its corollary, Mudville will be enmeshed in the difficult analysis of several factors. First, courts analyze the three primary factors identified in *Penn Central* to determine whether property has been taken by government regulations: "(1) '[t]he economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the government action.'"[30]

1. Economic Impact.

Under the first *Penn Central* factor, the court compared the negative economic impact of the regulation with the benefits that a landowner continues to receive from his land after the regulation goes into effect.[31] In balancing the economic impact against the benefits retained, the court will determine whether the individual is shouldering an unfair portion of the burden for a governmental action. The court will likely look at whether the plaintiff can obtain a "reasonable return" on his investment after the regulation goes into effect.

2. Investment-backed Expectations.

The second *Penn Central* factor is the extent to which the regulation has interfered with distinct investment-backed expectations. This is simply an alternative examination of the economic impact of the regulation on the plaintiff. If plaintiff invested money in a specific project, and a subsequent regulation rendered that project impermissible, the court is more likely to conclude that the regulation effects a taking.

3. Character of Government Action.[32]

Under the third *Penn Central* factor, the court considers the reason for the government action in determining whether the action constitutes a taking.[33] If the government acquires resources to permit or facilitate uniquely public functions, the action is likely a

taking.[34] This type of taking often arises from government's "entrepreneurial operations."[35] In considering the character of the government action, many courts primarily look at whether the regulation is "reasonably necessary to the effectuation of a substantial public purpose."[36] If the regulation fails this test, it is very likely to have caused a taking.

4. THE KAVANAU FACTORS.

Based on its survey of *Penn Central* and other cases, the California Supreme Court in *Kavanau* identified ten "other" relevant factors that should be examined when conducting the fact intensive "ad hoc" inquiry as to whether application or enforcement of a regulation has caused a taking. These factors are really restatements of the first three *Penn Central* factors. Seven of these ten factors affect the analysis of whether a property owner has been denied economically viable use of his or her land. This section explains how each of these seven factors addresses the economic viability component of the takings analysis:

(a) *whether the regulation interferes with interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute property for Fifth Amendment purposes.*

This factor reflects the exclusive focus of the takings clause on protecting property rights, rather than "pipe dreams." A taking cannot occur unless the challenged regulation "interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[37] A landowner's expectation must be reasonable, and more than a "unilateral expectation or an abstract need."[38] In *United States v. Willow River Power Co.*,[39] the Court held that a hydroelectric power plant owner had no property right in maintaining historic water levels of a navigable river, so no taking occurred when a federal dam raised water levels and reduced the plant's power output.[40] In *Good v. United States*,[41] the existence of restrictive regulations at the time property was acquired and when development was subsequently initiated deprived the landowner of any reasonable expectation that it could develop its property as proposed.[42]

Thus, in land-use cases, where a landowner contends an ordinance constitutes a taking by prohibiting a proposed commercial development, the court will focus on whether the project is a reasonable expectation bound up in the landowner's property or a mere unilateral expectation.

(b) *whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's primary expectation;*

This factor is a corollary of the first factor. A regulation that affects the existing or traditional use of a parcel is more likely to constitute a taking because it interferes with the landowner's primary expectation of land use.[43] A regulation that outlaws historic use is more likely to deny economically viable use. One that allows that use is less likely to deny economically viable use.

(c) *whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader;*

A regulation that eliminates a plaintiff's entire property interest is more likely to effect a taking.[44] The Supreme Court overturned such a regulation in *Pennsylvania Coal v. Mahon*,[45] In that case, a mining company sold surface rights to its property and expressly reserved the right to remove underground coal. In turn, the buyer of the surface rights expressly waived all claims for damages resulting from coal mining beneath the surface.xlvi A subsequently enacted state statute outlawed underground coal mining in areas that would cause subsidence damage to houses and other structures. The Court decided that this statute abolished a valuable estate in land, because it prohibited exercise of the reserved right to mine coal underlying housing, streets and whole cities.[47] Because the statute left plaintiff with no property rights, it constituted an unconstitutional taking.

(d) *whether the regulation permits the property owner to profit and to obtain a reasonable return on investment;*

A major factor is whether a regulation precludes a landowner from obtaining a reasonable return on its investment.[48] However, the United States Supreme Court has stated, that "[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform."[49] For this reason, courts will not speculate whether a specific land use will be profitable, but instead focus on whether a regulation allows a landowner to profit from its property, as opposed to forcing the landowner to leave its property economically idle.[50]

A regulation that eliminates profit and a reasonable economic return is likely to deny economically viable use of the property. One that leaves a mechanism for ensuring profit and economic return is less likely to cause that result.

(e) *whether the regulation provides the property owner with benefits or rights that mitigate whatever financial burdens the law has imposed;*

A court may consider any benefits offered by a government entity that lessen the effects of a financial impact of land-use regulation.[51] For example, a city could argue that a regulation's financial impact is mitigated by the landowner's ability to use or sell transferable development rights ("TDRs").[52]

(f) *whether the regulation prevents the highest and best use of the land;*

A court can consider whether a land-use regulation prevents the best use of the land as part of the takings analysis, but the denial of the highest and best use does not constitute a *per se* taking of property.[53] This is because "[t]here is no constitutional right on the part of landowners to develop their property for maximum economic profit, or to receive compensation when land-use regulations restrict their ability to do so."[54]

The allowance of the highest and best use of land will less likely create the denial of economically viable uses of the property.

(g) *whether the regulation extinguishes a fundamental attribute of ownership;*

A land-use regulation that eliminates a fundamental right of ownership is more likely to effect a taking.[55] For example, mandating public access to private property destroys the fundamental right to exclude others from one's property.[56]

IV. CONCLUSION.

The simple phrase "deprives the property owner of all economically viable use" defies simple analysis. In facial challenges, the existence of available uses, whether profitable or not, will defeat a takings challenge. In "as applied" cases, mere diminution of value or the denial of the highest and best use for the property will not constitute a taking. Beyond these simple rules, each "as applied challenge" requires a fact-intensive, ad hoc balancing test to determine whether a decision or action has caused an unconstitutional taking of private property without just compensation.

* *Harriet Steiner is a shareholder with McDonough, Holland & Allen (MHA) specializing in land use and environmental law. She has served as City Attorney for Davis for the last 12 years. Jan Patrick Sherry is also a shareholder with MHA specializing in land use, takings and eminent domain. Eric Robinson is an associate at MHA specializing in takings, water and natural resources law.*

Endnotes

1 *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); see *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (citing *Agins*); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (citing *Agins*).
2 *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 877 (9th Cir. 1987).
3 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
4 *Lucas, supra*, 505 U.S. at 1018 (emphasis added).
5 Id.
6 *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 877 (9th Cir. 1987).
7 *Lake Nacimiento*, 841 F2d at 877.
8 995 F.2d 161, 165 (9th Cir. 1993)
9 *Christensen*, 995 F.2d at 165.
10 *Lake Nacimiento*, 841 F.2d at 877.
11 *Agins, supra*, 477 U.S. at 258.
12 Id. at 257.
13 Id. at 258.
14 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1995) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
15 *Lucas*, 505 U.S. at 1015.
16 See *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 775 (1997) (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).
17 The balancing of all three economic factors against the nature of the governmental action will be the subject of the second part of this article.
18 *MacLeod v. Santa Clara County*, 749 F.2d 541, 548 (9th Cir 1984).
19 605 F.2d 1117, 1119 (9th Cir. 1979)
20 *Haas*, 605 F.2d at 1120.
21 *MacLeod, supra*, 749 F.2d at 534-44.
22 Id. at 548.
23 Id. at 547 (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 131 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365(1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)).
24 Id. at 549.
25 *MacLeod*, 749 F.2d at 548.
26 *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal. App. 3d 1016, 1036 (1991).
27 Id
28 Id. at 1038.
29 Id.
30 See *Kavanau, supra*, 16 Cal. 4th at 775 (citing *Penn Central, supra*, 438 U.S. at 124).
31 *Kavanau*, 16 Cal. 4th at 780.
32 Because this article focuses on economic viability, we limit our discussion of this factor, which could be the subject of an entire article of its own.
33 *Kavanau, supra*, 16 Cal. 4th at 775, 780.
34 Id. at 781.
35 *Penn Central, supra*, 438 U.S. at 128, 135.
36 *Penn Central*, 438 U.S. at 127.
37 *Kavanau*, 16 Cal. 4th at 775 (quoting *Penn Central supra*, 438 U.S. at 125).
38 *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984).
39 324 U.S. 499 (1945)
40 Id. at 511.
41 189 F. 3d 1355 (Fed. Cir. 1999)
42 Id. at 1357, 1362-1363.
43 *Kavanau*, 16 Cal. 4th at 775.
44 *Kavanau*, 16 Cal. 4th at 775.
45 260 U.S. 393 (1922).
46 Id. at 412.
47 Id. at 414.
48 *Kavanau*, 16 Cal. 4th at 775.
49 *Andrus v. Allard*, 444 U.S. 51, 66 (1979).
50 *Agins v. Tiburon, supra*, 447 U.S. at 262; *Lake Nacimiento Ranch Co. v. San Luis Obispo County, supra*, 841 F.2d at 877.
51 *Kavanau*, 16 Cal. 4th at 775.
52 *Penn Central, supra*, 438 U.S. at 137; see *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986) (citing *Penn Central's* discussion of TDRs as bearing on reasonableness of landowner's return on property investment); but see *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 745-750 (1997) (concurrence distinguishing Penn Central and calling TDRs relevant to just compensation issue, not whether taking has occurred).
53 *Long Beach Equities*, 231 Cal. App. 3d at 1036.
54 *Terminals Equipment Co. v. City & County of San Francisco*, 221 Cal. App. 3d 234, 244 (1990).
55 *Kavanau*, 16 Cal. 4th at 775.
56 *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979).

September 14–17, 2000

Sponsored by the Sections of the State Bar of California

WHY YOU SHOULD ATTEND:

- High Quality Educational Programs Presented Exclusively by State Bar Sections
- An Inter-Disciplinary Approach to Fulfilling Your MCLE Requirements
- Earn Up to 18 Hours of Participatory MCLE Credit
- At One Low Registration Fee of $245 is One of the Most Economically Priced MCLE Offerings Around!
- Choose From Over 130 Outstanding Educational Seminars/Events Covering a Wide Range of Topics and Practice Areas

State Bar of California ANNUAL MEETING 2000 SAN DIEGO SEPTEMBER 14-17

Registration Fees: $245 through August 14
$325 August 15–31 and on-site

For a Complete list of Courses, Visit our Website at www.calbar.org/annualmeeting

Registration Materials Will be Mailed in July. All Section Members Will Receive a Brochure. For More Information, Please Call Program Registrations at (415) 538-2508.

The State Bar of California Office of Section Education & Meeting Services is a State Bar of California Approved Provider

Earn up to 18 hours of Quality MCLE Credit for One Low Price!

Public Law Section Annual Meeting Programs

Recent Developments in State Immunity Under the Eleventh Amendment

A review of the major changes which have recently taken place concerning the courts' treatment of state government and state officers.

Saturday, September 16
8:30 a.m. – 10:30 a.m.

2 Hours MCLE credit

Pitchess Motions

A discussions of the do's and don'ts when handling motions for discovery of police officer personnel records.

Saturday, September 16
11:00 a.m. – 12:00 p.m.

1 Hour –MCLE, credit

The Ethics of a Public Lawyer

Three public law practitioners will analyze and debate the unique ethical issues facing government lawyers.

Saturday, September 16
2:15 p.m. – 4:15 p.m.

2 Hours MCLE Ethics Credit

Message From The Chair

By Paul Kramer

Summer has just officially begun as I write this and already its time, due to this Journal's lead times, for me to take my parting shots as Executive Committee Chair. Its been an interesting year, watching the State Bar wake from its dues bill veto induced slumber. I'll report to the Bar's Board of Governors on our accomplishments shortly after my term actually ends in September; look for that report on our internet site.

At times working within the Bar can be very frustrating. As an example, the Sections are now legislatively mandated to be financially self sufficient. We're achieving that by carefully watching expenses, graciously accepting the generosity of firms and agencies that pay all or part of their employee's travel expenses for our meetings (thank you!). This is in anticipation of a world, come 2002, in which over sixty percent of our revenue is returned to the Bar for administrative costs. Meanwhile, the Board of Governors maintains tight control over our activities.

Any public position we take on pending legislation must be approved by the Board even though it will be communicated as the position of the Public Law Section, not the Bar as a whole, with a reminder that the Sections are self funded by voluntary dues. In any event, the legislative process generally moves too fast for us to seek Board approval of a position. By then the bill is likely to have been amended several times or already be on the Governor's desk. For now we're coping with this disability by posting summaries of what we've identified as significant bills on our members only web pages. It is up to you to decide which bills to support or oppose and muster your agencies and colleagues in communicating your concerns to the legislature. (We are working with the other Sections to address the Bar policy. Time will tell the result.)

Despite this and other—I'll spare you—headaches, I've found my service on the Executive Committee a rewarding experience. When I began, I was a deputy county counsel; now I'm a state agency attorney. The Public Law Section has allowed me to work with many attorneys from cities, counties, special districts, other state agencies and private practitioners. I am richer for this experience and thank them, especially this year's Executive Committee members, for sharing in our efforts on your behalf. The next application cycle for Executive Committee membership will begin in January. I encourage you to consider joining us.

As this summer draws to a close, please join us at the Bar's annual meeting in San Diego. The details are printed elsewhere in this issue. Attend our sponsored MCLE classes or just stop in to help us acknowledge our Public Lawyer of the Year at our reception on Saturday, September 16th. We'd love to meet you and chat for a few minutes.

PUBLIC LAW JOURNAL
State Bar Education Foundation
Public Law Section
180 Howard Street, San Francisco, CA 94105-1639

Non Profit
Bulk Rate
PAID
San Francisco
California
Permit No. 611